

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

EUGENE HENRY IVES,

Petitioner,

Case No. 13-cr-20272

v

Honorable Thomas L. Ludington
Magistrate Judge Patricia T. Morris

UNITED STATES OF AMERICA,

Defendant.

**ORDER ADOPTING REPORT AND RECOMMENDATION, GRANTING
RESPONDENT'S MOTION TO DISMISS, DENYING PETITIONER'S MOTION TO
VACATE SENTENCE, DENYING CERTIFICATE OF APPEALABILITY AND
DENYING LEAVE TO PROCEED IN FORMA PAUPERIS ON APPEAL**

On May 21, 2013 an indictment was issued charging Petitioner Eugene Henry Ives with one count of attempting to transfer obscene material to a minor in violation of 18 U.S.C. § 1470. *See* ECF No. 1. A superseding indictment was issued that same day, adding two counts of sexual abuse of a minor in violation of 18 U.S.C. §§ 2243(a), 1151 and 1153, and two counts of abusive sexual contact with a minor in violation of 18 U.S.C. §§ 2244(a)(3), 1151 and 1153. *See* ECF No. 4. Ives initially pled guilty to the two sexual abuse charges on December 19, 2013, but after the presentence report disclosed that the parties had made a mutual mistake in calculating the guidelines, Ives was allowed to withdraw his guilty plea on March 19, 2014. *See* ECF No. 33. On April 17, 2014 Ives pled guilty to one count of sexual abuse of a minor. Ives was sentenced to 180 months' imprisonment on August 26, 2014, and judgement was entered on August 28, 2014. *See* ECF No. 42.

Ives filed a motion to vacate his sentence under 28 U.S.C. § 2255 on September 24, 2015, asserting ineffective assistance of counsel. *See* ECF No. 44. After the motion was referred to

Magistrate Judge Patricia T. Morris, Respondent filed a motion to dismiss Ives's petition, arguing that Ives's motion was untimely and that he had waived his right to collaterally attack his sentence through the Rule 11 plea agreement. *See* ECF No. 54. The magistrate judge issued her report on July 6, 2016, recommending that Respondent's motion to dismiss be granted and Petitioner's motion to vacate be denied. *See* ECF No. 60.

Although Magistrate Judge Morris's report explicitly stated that the parties to this action could object to and seek review of the recommendation within fourteen days of service of the report, neither Petitioner nor Respondent have filed any objections. The election not to file objections to the Magistrate Judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). The failure to file objections to the report and recommendation waives any further right to appeal.

Before Petitioner may appeal the Court's decision, a certificate of appealability must issue. See 28 U.S.C. § 2253(c)(1)(a); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a court denies relief on the merits, the substantial showing threshold is met if the petitioner demonstrates that reasonable jurists would find the court's assessment of the constitutional claim debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000). When a court denies relief on procedural grounds without addressing the merits, a certificate of appealability should issue if it is shown that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the court was correct in its procedural ruling. *Id.*

Having considered the matter, the Court concludes that Petitioner has failed to make a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability is not warranted in this case. The Court further concludes that Petitioner should not be granted leave to proceed *in forma pauperis* on appeal, as any appeal would be frivolous. *See* Fed. R. App. P. 24(a).

Accordingly, it is **ORDERED** that the magistrate judge's report and recommendation, ECF No. 60, is **ADOPTED**.

It is further **ORDERED** that Respondent's motion to dismiss, ECF No. 54, is **GRANTED**.

It is further **ORDERED** that Petitioner Ives's motion to vacate, ECF No. 44, is **DENIED**.

It is further **ORDERED** that a certificate of appealability is **DENIED**.

It is further **ORDERED** that leave to proceed *in forma pauperis* on appeal is **DENIED**.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: August 1, 2016

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on August 1, 2016.

s/Michael A. Sian
MICHAEL A. SIAN, Case Manager